APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DATED OCTOBER 20, 2000

United States Court of Appeals,

Eleventh Circuit.

ROSA M. TOWNSEND,

Plaintiff-Appellee,

versus.

THE MIAMI-HERALD PUBLISHING COMPANY, KNIGHT-RIDDER, INC.,

Defendants-Appellants.

(October 20, 2000)

Appeal from the United States District Court for the Southern District of Florida

Before EDMONDSON, WILSON and MAGILL*, Circuit Judges.

PER CURIAM:

AFFIRMED. See Eleventh Circuit Rule 36-1.

* Hon. Frank J. Magill, U.S. Circuit Judge for the Eighth Circuit, sitting by designation.

APPENDIX B – ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA DATED JANUARY 31, 2000.

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

MIAMI DIVISION

Case No. 98-1485-CIV-JORDAN

ROSA M. TOWNSEND,

Plaintiff.,

vs.

KNIGHT RIDDER, INC., and THE MIAMI HERALD PUBLISHING CO.,

Defendants.

ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Plaintiff Rosa M. Townsend sues her former employers, Knight Ridder, Inc., and The Miami Herald Publishing Company, for alleged discrimination and retaliation under the Equal Pay Act ("EPA"), 29 U.S.C. § 206(d) (Count I), the anti-retaliation provisions of the Fair Labor Standards Act, 29 U.S.C. § 215(a)(3) (Count II), Title VII of the Civil Rights Act of 1964, as amended by the Civil Rights Act of 1991 (Counts III & IV), 42 U.S.C. 2000e *et seq.*, and the Florida Civil Rights Act of 1992 ("FCRA") (Counts V & VI) [D.E. 36]. Ms. Townsend

alleges that Knight Ridder and The Miami Herald Publishing Company discriminated against her because of her sex and bring claims for wage discrimination, failure to promote, and retaliatory discharge.

I. Jurisdiction and Procedural Posture

This Court has jurisdiction pursuant to 28 U.S.C. §§ 1331; § 16(b) and 17 of the Fair Labor Standard Act, as amended, 29 U.S.C. § 216(b) & 217; and § 706(f) of the Civil Rights Act of 1964, 42 U.S.C. 2000e(5)(f). This Court also has supplemental jurisdiction over Ms. Townsend's state law claims under 28 U.S.C. § 1367.

Knight Ridder and the Miami Herald Publishing Company move for summary judgment on all of Ms. Townsend's discrimination and retaliation claims. *See* Motion for Summary Judgment of Knight Ridder and Miami Herald Publishing Company [D.E. 70] (Sept. 3, 1999). Summary judgment is appropriate if pleadings, depositions, and affidavits show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986) (quoting Fed. R. Civ. P. 56(c)). An issue of fact is "material" if it is a legal element of the claim under the applicable substantive law which might affect the outcome of the case, and it is "genuine" if the record taken as a whole could lead a rational trier of fact to find for the nonmoving party. *Allen v. Tyson Foods, Inc.*, 121 F.3d 642, 646 (11th Cir. 1997). The Court must therefore view the evidence and all factual inferences therefrom in the light most favorable to Ms. Townsend. *Id.* Ms. Townsend, however, bears the burden of coming forward with persuasive evidence on each essential element of her claims such that a reasonable jury could find in her favor. *Anderson v. Liberty Lobby, Inc.*,

477 U.S. 242, 247-48 (1986) (a mere "scintilla of evidence" is not enough); *Earley v. Champion Int'l Corp.*, 907 F.2d 1077, 1080 (11th Cir. 1990); *see also Mayfield v. Patterson Pump Co.*, 101 F.3d 1371, 1376 (11th Cir.1996) (conclusory allegations and conjecture cannot be the basis for denying summary judgment).

II. Facts

On June 10, 1988, Rosa Townsend was hired as a copy editor for *el Nuevo Herald*. At all relevant times, *el Nuevo Herald* was the Spanish-language insert to *The Miami Herald*. It has since become a separate publication. *See* Declaration of *Miami Herald* Publisher, Alberto Ibarqüen ¶2 at 1 [D.E. 72, Attachment 4] (Sept. 3, 1999). At all times, *el Nuevo Herald* and *The Miami Herald* were operated separately, although they shared some resources. *See id.* ¶3 at 2. Knight Ridder owns both newspapers. Ms. Townsend alleges that the Miami Herald Publishing Company is also an employer of the reporters of those newspapers, although the Miami Herald Publishing Company denies having any employees.

At the time relevant to this suit, Ms. Townsend reported directly to the assistant city editor, Gladys Nieves, and later José Cabaleiro, or to the city editor, Alfredo Casares. The managing editor, Robert Fabricio, supervised the city editor and the editor, Barbara Guitierrez, supervised the managing editor. The publisher of *el Nuevo Herald*, Alberto Ibarqüen, was the ultimate supervisor.

Reporters at *el Nuevo Herald* and *The Miami Herald* were classified from Reporter 1, the lowest rank; to Reporter 4, the highest rank. A Reporter 3 is paid anywhere from $750 to $1126 per week, while a Reporter

4 earns between $975 and $1463 per week. According to Knight Ridder's job description, a Reporter 4 must have the skills of Reporters 1, 2, and 3, plus the following:

> [Reports and writes a wide range of stories with minimal supervision, whether on short or long-term assignments or projects. Has superior writing skills (flawless copy). Is expected to generate enterprise stories. Analyzes complex records with expertise. Possesses specialized knowledge and/or contacts. May serve as critic or columnist. [Is] proficien[t] in English and Spanish.

Reporter 4 Job Description [D.E. 72, Attachment 16] (April 11, 1994).

In 1991, Ms. Townsend was assigned to be a travel editor, and four years later was assigned to work as an investigative reporter and classified as a Reporter 3. As an investigative reporter, Ms. Townsend covered politics and legislation all over Florida, although she mostly handled local city politics in Miami, reporting on city commission meetings, mayoral races, and other newsworthy events in the city. In March of 1997, Ms. Townsend was earning $978 per week and in March of 1998 she received a raise to $1007 per week.

In the fall of 1997, Ms. Townsend's supervisors prepared an evaluation of her performance for that year. In March of 1998, Mr. Casares and Mr. Cabaliero met with Ms. Townsend to present and discuss her performance and give her a 6.5 percent raise. The evaluation represented a consensus of all of Ms. Townsend's supervisors, excluding Mr. Ibarqüen, who does not

participate in employee evaluations.[1] The evaluation noted several of Ms. Townsend's strengths as an investigative reporter, but also offered criticisms and areas of improvement with respect to her writing and communication skills. For example, the evaluation stated that Ms. Townsend needed to organize her time more effectively; that she tended to get bogged down in details and over-report; that she needed to write faster and more clearly; that she needed to improve her ability to work as part of a team; and that she had an overly defensive attitude, *See* Newsroom Performance Evaluation of Rosa Townsend [D.E. 71, Attachment 1, Exhibit 1] (Oct. 1, 1997). Ms. Townsend disagreed with these criticisms and refused to sign the evaluation. In addition Ms. Townsend demanded a larger wage increase and asked that she be promoted from Reporter 3 to Reporter 4.

A few days later, on March 13, 1998, Ms. Townsend met with Mr. Ibarqüen to discuss her evaluation and her desire to be promoted to Reporter 4. Ms. Townsend complained that she should be paid the same salary as Gerardo Reyes, a report for *The Miami Herald*, and that the newspaper's failure to pay her an equal salary was sex

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[1] Ms. Nieves began preparation of the evaluation, but subsequently left *el Nuevo Herald* and handed over the finalizing of the evaluation to Mr. Cabaliero. Ms. Nieves has since read the final evaluation and agrees with every substantive point made in it. Ms. Nieves also agrees that, as of the time she left *el Nuevo Herald*, Ms. Townsend's performance did not merit a promotion to Reporter 4. *See* Declaration of Gladys Nieves ¶ 4 [D.E. 72, Attachment 5] (Sept. 1, 1999).

discrimination.[2] Mr. Ibarqüen disagreed, stating that her status as Reporter 3 was based on her supervisors' assessment of her performance. According to Ms. Townsend, Mr. Ibarqüen told her that she was chronically complaining and said: "I will not tolerate you accusing us of discriminating against you. You first brought a sexual harassment complaint. Now discrimination. What's next?" *See* Deposition of Rosa Townsend at 127 [D.E. 69] (Aug. 10, 1999). Mr. Ibarqüen does not recall using these words, *see* Ibarqüen Declaration ¶ 8 at 5, but the Court must assume he made the statement for purposes of

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[2] Ms. Townsend's discrimination complaint is based on her belief that she should be paid the same as Mr. Reyes. That was the substance of her first conversation with Mr. Ibarqüen:

> What I said was that I think I deserve to be Reporter 4, and I would like him to reconsider my position because my evaluation — I received the evaluation prior day and my request was ignored and, therefore, I would like to him to reconsider and to do an investigation into what I was saying, to review carefully my merits on that. And, of course, I said I compare myself to Gerardo Reyes and said that I felt that I was being discriminated against because of my work versus his work, versus his salary, and being a woman, he was a man. So there was no reason, other than the sex. And I brought that to him.

Townsend Deposition at 125-26.

deciding this motion.

Mr. Ibarqüen then met with Mr. Casares, Mr. Fabricio and Ms. Gutierrez, and after discussing Ms. Townsend's qualifications, they concurred that she did not meet the standards for a promotion to Reporter 4. On April 7, 1998, Mr. Fabricio and Mr. Casares met with Ms. Townsend and provided her a memo explaining their reasons for not promoting her which echoed the criticisms in the evaluation. The memo also provided suggestions to assist her in developing the skills that would facilitate a promotion to Reporter 4.

Ms. Townsend went to see Mr. Ibarqüen two more times, once a few days after the meeting with Mr. Fabricio and Mr. Casares, and once on April 27, 1998. During those meetings, Ms. Townsend reiterated her belief that she should be promoted immediately, and Mr. Ibarqüen repeated that the consensus of the editors was that she remain a Reporter 3. Ms. Townsend's final meeting with Mr. Ibarqüen lasted ten to fifteen minutes. *See* Townsend Deposition at 142. Ms. Townsend sought out Mr. Ibarqüen to find out whether he had investigated her prior complaints and had reconsidered whether she should be promoted. *See id.* At 143-144. Mr. Ibarqüen was not receptive to her contention that the reason she was not a Reporter 4 like Mr. Reyes was sex discrimination. According to Mr. Ibarqüen, Ms. Townsend stated that the conditions imposed on her were intolerable and that her supervisors were not treating her fairly. He suggested that she speak with Amalio Carneiro, the vice president of human resources, whose job it was to investigate employee complaints. *See* Ibarqüen Declaration ¶ 14 at 8-9.

While Ms. Townsend was complaining about her

supervisors to Mr. Ibarqüen, her supervisors were growing increasingly dissatisfied with what they perceived as her insubordinate attitude. *See* Declaration of City Editor Alfredo Casares ¶¶ 11, 13, 15 & 16 at 3-5 [D.E. 72, Attachment 1] (Aug. 2, 1999); Declaration of Managing Editor Roberto Fabricio ¶¶ 5, 7 & 8 at 2-5 [D.E. 72, Attachment 2] (Sept. 2, 1999). As a result, Mr. Ibarqüen, Mr. Fabricio, and Ms. Gutierrez determined to interpret this alleged insubordination as a resignation or as a basis for her termination. *See* Ibarqüen Declaration ¶ 15 at 9; Fabricio Declaration ¶ 7 at 4; Declaration of Editor Barbara Gutierrez ¶ 6 at 3 [D.E. 72, Attachment 3] (Sept. 2, 1999). Ms. Townsend was terminated on April 30, 1998.

Ms. Townsend's contention that she should have been paid as much as Mr. Reyes is based on her belief that they began working for the defendants at roughly the same time and had similar experience. *See* Townsend Deposition at 239. Ms. Townsend concedes, however, that she never investigated Mr. Reyes' qualifications or experience and that her knowledge about his experiences comes entirely from her recollection of scattered conversations she has had with him and unnamed others "throughout the years." Townsend Deposition at 240-41.

During 1997 and 1998, Mr. Reyes was a reporter for *The Miami Herald* and was a Reporter 4 assigned to the Latin American desk. He was earning $1,154 per week in May of 1997 and $1,183 per week in May of 1998. Mr. Reyes worked on local storied concerning Miami politics, but his primary responsibility was covering Latin American politics. Born in Colombia, Mr. Reyes holds a law degree and used to work for a leading Colombian daily newspaper. According to Mr. Reyes and Mr. Ibarqüen, Mr. Reyes' job requires extensive background and

experience in Latin American politics and a network of contacts at high levels of government or business. Mr. Reyes has worn several awards for achievement in journalism and had headed up professional organizations for investigative reporters.

III. Miami Herald Publishing Company's Motion for Summary Judgment on All Counts

Defendant Miami Herald Publishing Company ("MHPC") moves for summary judgment on all counts, claiming that it was never Ms. Townsend's employer. Ms. Townsend argues that she is employed by MHPC because the Federal Employee Identification Number ("EIN") and her IRS Form W-4 is the same MPHC's EIN number used to file reports with the Florida Secretary of State. *See* Plaintiff Rosa Townsend's Response to Defendants' Statement of Undisputed Facts ("Plaintiff's Response"), at 14 & Attachments 24, 25 [D.E. 93, 91] (November 3, 1999). MHPC states that EIN number listed with the Secretary of State is in fact Knight Ridder's number, and the filing of MHPC reports under this number was the result of administrative error. *See* Declaration of Lynda Hauswirth ¶ 9 [D.E. 95, Attachment 4] (January 15, 1999). MHPC explains that it shares the same name with Knight Ridder's unincorporated division. Knight Ridder contends that MHPC does not publish either newspaper and has neither assets nor employees. *See* Hauswirth Declaration ¶ 8. The Court finds that there is a genuine issue of material fact regarding whether MHPC employed Ms. Townsend. Accordingly, the Court will assume that both MHPC and Knight Ridder employed Ms. Townsend for purposes of the defendants' remaining arguments.

For the remainder of this opinion, "Knight Ridder" shall be understood to refer to both defendants. The

action so the editors of *el Nuevo Herald* and *The Miami Herald* will be deemed attributable to both Knight Ridder and MHPC. *See, e.g., Vernon v. Medical Management Assocs. of Margate*, 912 F. Supp. 1549, 1555 (S.D. Fla. 1996) (holding that employers are liable for act of discrimination by their agents).

IV. Equal Pay Act

Ms. Townsend claims that Knight Ridder discriminated against her in violation of the Equal Pay Act ("EPA") 29 U.S.C. § 206(d). The EPA states:

> No employer . . . shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishments at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work in jobs the performance of which requires equal skill, effort, and responsibility and which are performed under similar working conditions, excerpt where such payment is made pursuant to . . . (iv) a differential based on any other factor other than sex . . . .

29 U.S.C. § 206(d).

After reviewing the undisputed facts in light of the relevant case law, the Court finds that Ms. Townsend is unable to state a prima facie case for discrimination under the EPA because her work and Mr. Reyes' work do not require "equal skill, effort, and responsibility." Moreover, even if Ms. Townsend were able to state a prima facie case of discrimination under the EPA, she does not offer sufficient evidence to rebut Knight Ridder's showing that

the decision to pay her a lesser wage was based on factors other than sex.

A. Prima Facie Test under the EPA

To state a prima facie case of discrimination under the EPA, Ms. Townsend must show that her employer "pays different wages to employees of opposite sexes 'for equal work on jobs the performance of which requires equal skill, effort, and responsibility." *Mulhall v. Advance Security, Inc.*, 19 F.3d 586, 590 (11th Cir. 1994) (quoting *Corning Glass Works v. Brennan*, 417 U.S. 188, 195 (1974)). In addition, Ms. Townsend must show that she worked in the same "establishment" as those employees against whom she seeks to compare herself. *See id.* Although Ms. Townsend does not have to prove that the jobs are identical, she has the "heavy burden of proving substantial identity of job functions." *Waters v. Turner, Wood & Smith Ins. Agency, Inc.*, 874 F.2d 797, 799 (11th Cir. 1989) (quoting *Brennan v. City Stores, Inc.*, 479 F.2d 235, 238 (5th Cir. 1973). In determining whether the jobs are substantially identical, courts compare the jobs, and not the individual employees holding those jobs. *See Mulhall*, 19 F.3d at 592; *Miranda v. B & B Cash Grocery Store, Inc.*, 975 F.2d 1518, 1534 (11th Cir. 1992). Courts consider only the "skills and qualifications actually needed to perform the jobs." *Miranda*, 975 F.2d at 592. If Ms. Townsend is able to satisfy these tests as applied to even just one comparator, she establishes a prima facie case for violation of the EPA. *See Mulhall*, 19 F.3d at 590.

The Court finds that Mr. Reyes is not a "comparator" for Ms. Townsend under the EPA. Although Knight Ridder disputes that *el Nuevo Herald* and *The Miami Herald* are the same "establishment" under the

EPA, the Court will assume that they are for purposes of analysis under the EPA. Nevertheless, although Ms. Townsend and Mr. Reyes were both investigative reporters who wrote and investigated stories that were published in *The Miami Herald* and *el Nuevo Herald*, their day-to-day responsibilities, skills, and effort differed in several basic ways. Mr. Reyes was a reporter on Latin American desk for *The Miami Herald*, whereas Ms. Townsend handled mainly local stories for *el Nuevo Herald*.

Mr. Reyes' job required extensive experience in Latin American politics, a knowledge of the laws of several Latin American countries, a familiarity with Latin American governmental process, and a network of contacts, many at high levels of government or business. *See* Declaration of Gerardo Reyes ¶ 4 [D.E. 72, Attachment 6] (Sept. 6, 1999); Ibarqüen Declaration ¶ 10 (stating that Mr. Reyes' "job required a background of the countries' culture, knowledge of their legal systems, including electoral laws, knowledge of the political environments, and highly placed, credible sources, official and otherwise"). Although Mr. Reyes also covered local stories, his additional responsibilities for international stories distinguish him from the work of exclusively local reporters like Ms. Townsend. For example, Mr. Reyes was often required to travel abroad for his stories. *See* Reyes Declaration ¶ 4; Ibarqüen Declaration ¶ 10. The record evidence shows that Mr. Reyes traveled to international cities and countries such as San Juan, Quito, Panama, Lima, Cali, Honduras, Bogota, and Aruba for stories. *See* Summary of Gerado Reyes' Investigative Latin Desk Stores [D.E. 91, Attachment 13].

Ms. Townsend does not present evidence that she has comparable skills, specialized knowledge, or contacts.

As a reporter for *el Nuevo Herald*, Ms. Townsend covered mostly local city politics and occasionally handled politics and legislation for Florida. *See* Townsend Deposition at 25. Ms. Townsend's work as a local reporter includes covering city commissions, mayoral races, and "things that were happening in the city of Miami." *Id.* Ms. Townsend does not present any evidence that her job required specialized knowledge or skills comparable to those required for Mr. Reyes' position. Outside of four or five trips to Tallahassee, Florida, in two years, Ms. Townsend offers no evidence of travel requirements for her job.

Ms. Townsend contends that her work is comparable to Mr. Reyes because she produced an equal number of stories published in *The Miami Herald* and a greater number of stories overall. *See* Plaintiff's Response [D.E. 91] at 5-6. While the number of stories produced may be one indicator of the amount of effort required of a reporter, Ms. Townsend concedes that writing stories is just one aspect of the job. Presumably, much time is spent gathering information as well as writing stories. An investigative reporter would be expected to spend more time reporting and less time writing and, consequently, to publish less frequently. For example, Ms. Townsend had to attend city commission meetings regularly to gather information for her stories. *See* Townsend Deposition at 26. Ms. Townsend has no idea what Mr. Reyes was doing day-to-day to report the news and bases her comparison only on what he published. *See* Townsend Deposition at 68. Accordingly, the Court finds that Ms. Townsend's statement that her job required equal skill and more work than Mr. Reyes, *see* Townsend Deposition at 66, is conclusory and not based on any personal knowledge other than the number of stories published by Mr. Reyes, a fact minimally probative of the skill and effort required

of a reporter.

In sum, Ms. Townsend has failed to provide sufficient evidence to show that her work as a local reporter requires equal skill, effort, and responsibility as Mr. Reyes' work on the Latin American desk and has therefore failed to establish a prima facie case of discrimination under the EPA.

B. Factors Other than Sex

Even if Ms. Townsend were able to provide sufficient evidence for a prima facie case of discrimination, the Court finds that Knight Ridder has shown that its decision was based on "factors other than sex." Once a plaintiff establishes a prima facie case, the burden then shifts to the employer to prove by a preponderance of the evidence that the difference in pay is justified by one of the four exceptions to the EPA. *See Irby v. Bittick*, 44 F.3d 949, 954 (11th Cir. 1995); *Mulhall*, 19 F.3d at 590. One exception allows Knight Ridder to show that it based its employment decision on "a differential based on any other factor other than sex." 29 U.S.C. § 206(d)(1)(iv). Knight Ridder's burden is a "heavy one" because it must show "that the factor of sex provided no basis for the wage differential." *Irby*, 44 F.3d at 954 (quoting *Mulhall*, 19 F.3d at 590). If Knight Ridder meets this burden, Ms. Townsend may rebut the explanation by showing with affirmative evidence that Knight Ridder's reasons is pretextual or offered as post-event justification for a gender-based differential. *See Irby*, 44 F.3d at 954; *Schwartz V. Florida Bd. Of Regents*, 954 F.2d 620, 623 (11th Cir. 1991) (per curiam).

An employer bases its decision on "any factor other than sex" when there is a pay differential based on

"unique characteristics of the same job; . . . an individual's experience, training or ability; or . . . special exigent circumstances of the same job; . . . an individual's experience, training or ability; or . . . special exigent circumstances connected with the business. *Irby v. Bittick*, 44 F.3d at 955 (quoting *Glenn Motors Corp.*, 841 F.2d 1567, 1571 (11th Cir. 1988), and finding that comparator's unique long-term experience was a justification for pay difference under the EPA as a "factor other than sex"); *see also Wu v. Thomas*, 847 F.2d 1480, 1485 (11th Cir. 1988). Where a pay differential is based on an employee's ability or performance, there is inevitably an element of subjectivity in the employer's decision. However, "provided that there are demonstrable reasons for the decision, unrelated to sex, subjectivity is permissible." *EEOC v. Aetna Ins. Co.*, 616 F.2d 719, 725 (4th Cir. 1980) (footnote omitted). "So long as subjective business justifications, not part of a merit system, are not overly subjective so as to render them incapable of being rebutted, they are legitimate factors to be considered." *Schwartz*, 954 F.2d at 624; *see also Fowler v. Blue Bell, Inc.*, 737 F.2d 1007, 1011 (11th Cir. 1984).

Knight Ridder asserts that it paid Mr. Reyes a higher salary because he was classified as a Reporter 4, whereas Ms. Townsend was classified as a Reporter 3. *See* Ibarqüen Declaration ¶ 10. To be classified as a Reporter 4, a reporter must have superior writing skills, be able to analyze complex records with expertise, possess specialized knowledge and/or contacts, have a college degree in journalism, and be proficient in English and Spanish. *See* Reporter 4 Job Description, [D.E. 72, Attachment 16]. Although Mr. Reyes' classification as Reporter 4 alone does not demonstrate that he was more qualified, Mr. Reyes' educational background, work experience, and 1997 Knight Ridder performance

evaluation supports Knight Ridder's assessment that he had the skills required to be a Reporter 4 and is entitled to relatively high pay. *See* Miami Herald Performance Evaluation of Gerardo Reyes [D.E. 91, Attachment 12] (Dec. 6, 1997). Mr. Reyes holds a law degree and maintained a successful journalism career with a leading Colombian newspaper before working for the Herald. *See* Reyes Declaration ¶ 4. He has won several journalism awards, has taught classes in investigative journalism, and has headed up professional organizations for investigative reporters. *See id.* ¶ 5. Although the evaluation suggests areas for improvement, it evidences Mr. Reyes' specialized skills and experience in Latin American journalism. *See id.* ¶ 4; Performance Evaluation [D.E. 91, Attachment 12].

In contrast, Ms. Townsend's supervisors unanimously agreed that Ms. Townsend was not qualified to be a Reporter 4. *See* Casares Declaration ¶ 8; Fabricio Declaration ¶¶ 2, 3, 5; Gutierrez Declaration ¶ 2; Ibarqüen Declaration at ¶¶ 4, 5; Nieves Declaration ¶¶ 3, 4. They concurred that she was an above-average Reporter 3, but needed to make certain improvements in order to be promoted to Reporter 4. In support of their conclusion, her supervisors cited weaknesses in her writing ability, her initiative and creativity, her ability to meet deadlines, and her attitude. *See* Rosa Townsend Performance Evaluation; Memo to Rosa Townsend from Alfredo Caseres and Robert Fabricio [D.E. 72, Attachment 1, Exhibits 1 & 2] (April 7, 1998). Accordingly, Knight Ridder has satisfied its burden of proving that it based its decision to pay Mr. Reyes a higher salary than Ms. Townsend on "factors other than sex."

Ms. Townsend may rebut Knight Ridder's explanation for the pay disparity by showing with affirmative evidence that Knight Ridder's reason is

pretextual. *See Irby*, 44 F.3d 954; *Swartz* (sic), 954 F.2d at 623. Although Ms. Townsend disagrees with her supervisors' assessment of her abilities, outside of her own conclusions, she offers no other rebuttal evidence.

> The inquiry into pretext centers upon the employer's beliefs, and not the employee's own perceptions of his performance. . . . Where an employer produced performance reviews . . . and other documentation that demonstrate poor performance, an employee's assertion of his own good performance are insufficient to defeat summary judgment, in the absence of other evidence.

Holifield v. Reno, 115 F.3d 1555, 1565 (11th Cir. 1997) (citations omitted). Thus, even assuming that she established a prima facie case, Ms. Townsend failed to create an issue of material fact regarding her employer's reason for not promoting her to Reporter 4. Knight Ridder's motion for summary judgment on Count I of Ms. Townsend's amended complaint is GRANTED.

V. Title VII

Knight Ridder also moves for summary judgment on Ms. Townsend's claims that Knight Ridder violated Title VII by failing to promote her to Reporter 4 and by paying her a lesser wage than Mr. Reyes. Because Knight Ridder offers the same business reason for both of these claims, the Court will analyze the claims together.

Under Title VII, it is unlawful for an employer "to discriminate against any individual with respect to his compensation . . . because of such individual's . . . sex." 42 U.S.C. § 2000e-2(a)(1). A party may rely on direct or

circumstantial evidence to prove intentional discrimination. *See Nix v. WLCY Radio/Rahall Communications*, 738 F.2d 1181, 1184 (11th Cir. 1984). Where a party relies on circumstantial evidence to show discriminatory intent, courts generally adhere to the *McDonnell Douglas-Burdine* framework. *See Holifield*, 115 F.3d at 1561-62. For purposes of deciding the Title VII claims, the Court will assume that Ms. Townsend has stated a prima facie case of discrimination.[3] The burden

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[3] To state a prima facie case of discrimination for failure to promote Ms. Townsend must show that (1) she belongs to a protected class; (2) she was qualified for and applied for a promotion; (3) she was not promoted; and (4) after her rejection, the position remained open and the employer continued to seek similarly qualified applicants. *See McDonnell-Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973); *Maddox v. Claytor*, 764 F.2d 1539, 1546 (11th Cir. 1985).

Knight Ridder argues that Ms. Townsend does not meet the prima facie requirements because she cannot produce any evidence that she was qualified for the position of Reporter 4. The determination of whether a employee is qualified for a promotion to Reporter 4 is almost entirely based on the subjective evaluation of the employee by the editors and supervisors of Knight Ridder. Where an employer bases the decision to promote an employee on entirely subjective criteria, the *McDonnell Douglas* test becomes an unrealistic standard because the plaintiff's burden of proving that she is qualified is virtually impossible. *See Maddox*, 764 F.2d at 1547 (citing *Crawford v. Western Elec. Co.*, 614 F.2d 1300, 1315 (5th Cir. 1980). However, where possible, it is "within a district court's role and capabilities" to "assess whether

(continued...)

thus shifts to Knight Ridder to proffer legitimate nondiscriminatory reasons for its employment decision. *See Damon v. Fleming Supermarkets of Florida*, 196 F.3d 1354, 1361 (11th Cir. 1999). The Court finds that Knight Ridder has come forward with legitimate non-discriminatory reasons. Knight Ridder states that Mr. Reyes was paid more than Ms. Townsend because he had more experience and was better qualified than Ms. Townsend and that Ms. Townsend was not promoted because she lacked certain skills required of a Reporter 4.

Once Knight Ridder meets its burden of showing a legitimate business reason for its actions, the *McDonnell Douglas* framework, with its presumptions and burdens, drops out of the case, and Ms. Townsend has the ultimate burden of producing sufficient evidence to persuade the trier of fact that Knight Ridder intentionally discriminated her. (sic) *See Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981). For the same reasons as noted in Section IV.B of this order, the Court finds that Ms. Townsend has failed to provide any evidence that Knight Ridder's reasons were pretextual or otherwise

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(...continued)
the subjective employment qualification was bona fide and whether the employer's testimony that the plaintiff did not possess the qualification was credible." *Hill v. Seaboard Coast Line R.R.*, 885 F.2d 804, 809 (11th Cir. 1989). Because the requirements for Reporter 4 include subjective elements, the Court will assume that Ms. Townsend meets the qualification prong for the prima facie test. This is not to say that the Court finds that Ms. Townsend was "qualified" for the promotion, but rather that her qualifications will be considered for purposes of Knight Ridder's legitimate business reason for its decision.

motivated by a discriminatory motive. Therefore, Knight Ridder's motion for summary judgment on Counts III & V of Ms. Townsend's amended complaint is GRANTED.

VI. Retaliation

Knight Ridder moves for summary judgment on Ms. Townsend's claims for retaliation under the EPA, Title VII, and the Florida Civil Rights Act. Implicitly conceding that there are no issues of material fact to be tried, Ms. Townsend cross-moves for summary judgment on these claims. *See* Plaintiff's Response to Defendants' Motion for Summary Judgment at 16 [D.E. 91] (Nov. 1, 1999). Retaliation claims under the EPA and FCA are construed in accordance with case law interpreting retaliation claims under Title VII. *See Harper v. Blockbuster Entertainment Corp.*, 139 F.3d 1385, 1387, 1389 (11th Cir. 1998) (decision construing Title VII retaliations claims guide the analysis of retaliation claims under the Florida Civil Rights Act); *EEOC v. Reichold Chem., Inc.*, 988 F.2d 1564, 1571-72 (11th Cir. 1993) (applying Title VII analysis to plaintiff's retaliation claims under the Equal Pay Act and Title VII).

To state a claim for retaliation, a plaintiff must show (1) that she engaged in statutorily protected expression; (2) that she suffered an adverse employment action; and (3) that there is some causal relationship between two events. *See Holifield*, 115 F.3d at 1566. An employee is engaged in statutorily protected expression where she has engaged in one of the following types of protected activity: (1) opposing an employment practice made unlawful by Title VII ("opposition clause"); or (2) "ma[king] a charge, testif[ying], assist[ing], or participat[ing] in any manner in an investigation, proceeding, or hearing" under Title VII ("participation

clause"). *Clover v. Total System Servs., Inc.*, 176 F.3d 1346, 1351 (11th Cir. 1999). In this case, it is undisputed that Ms. Townsend's protects falls under the opposition clause of Title VII.

To state a claim for retaliation under the opposition clause, Ms. Townsend must show that she had a good faith, reasonable belief that Knight Ridder was engaged in unlawful employment practices. *See Little v. United Tech., Carrier Transicold Div.*, 103 F.3d 956, 960 (11th Cir. 1997). Ms. Townsend need not prove her underlying claim of discrimination which lead to her protect. *See Tipton v. Canadian Imperial Bank of Commerce*, 872 F.2d 1491, 1494 (11th Cir. 1989; *Jurado v. Eleven-Fifty Corp.*, 813 F.2d 1406, 1411 (9th Cir. 1987). Such a requirement "'[w]ould not only chill the legitimate assertion of employee rights under Title VII but would tend to force employees to file formal charges rather than seek conciliation of informal adjustment of grievances.'" *Little*, 103 F.3d at 960 (quoting *Sias v. City Demonstration Agency*, 588 F.2d 692, 695 (9th Cir. 1978); *see also Payne v. McLemore's Wholesale & Retail Stores*, 654 F.2d 1130, 1140 (5th Cir. 1981). Nevertheless, it "is insufficient for a plaintiff 'to allege [her] belief in this regard was honest and bona fide. . . .'" *Harper v. Blockbuster Entertainment Corp.*, 139 F.3d 1385, 1388 (11th Cir. 1988) (citation omitted). Although the conduct opposed need not actually constitute a discrimination claim, it "must be close enough to support an objectively reasonable belief that it is." *Clover*, 176 F.3d at 1351; *see Tipton*, 872 F.2d at 1494; *Jurado*, 813 F.2d at 1411.

"The objective reasonableness of an employee's belief that her employer has engaged in an unlawful employment practice must be measured against existing substantive law." *Clover*, 176 F.3d at 1351. For example,

with respect to claims for sexual harassment, a plaintiff's complaints of harassment are not objectively reasonable where the harassing and discriminatory conduct is far from rising to the level of constituting a hostile work environment. *See id.* (holding that plaintiff's belief that co-worker sexually harassed her was not objectively reasonably where co-worker made frequent visits to plaintiff's work area, called her on her beeper during work hours, hung up the phone on everyone except plaintiff, and responded to plaintiff is a "flirting kind of style"); *Santiago v. Lloyd*, 66 F. Supp. 2d 282, 287 (D.P.R. 1999) (finding that comments by co-worker that plaintiff was employer's "girlfriend" and that plaintiff was "turning into a bitch" were insufficient to show an objectively reasonable belief of sexual harassment). In other scenarios, courts have found that a plaintiff has failed to engage in statutorily protect(sic) activity because the alleged discriminatory acts could not be imputed to the employer. *See Little*, 103 F.3d at 960; *Barham v. State of N.Y. Unified Court SYS.*, 1998 WL 107117, at *3-4 (S.D.N.Y. 1998). Finally, where the alleged acts are simply not the types of acts actionable under the discrimination laws, the complaint of discrimination is not objectively reasonable. *See Harper*, 139 F.3d at 1388 n.2 (holding that plaintiff's belief that employer's grooming policy, which prohibited men from wearing long hear, was discriminatory was not objectively reasonable in light of long history of precedent holding to contrary); *Harvey v. Chevron U.S.A., Inc.*, 961 F. Supp. 1017, 1033 (S.D. Tex. 1997) (holding that female plaintiff's belief of sex discrimination was not objectively reasonable where she alleged that her male employer favored another female who was employer's paramour).

Here, Knight Ridder does not deny that Ms. Townsend's protests were made in good faith. Knight

Ridder does argue, however, that her protests of discrimination were not objectively reasonable. After reviewing the facts of this case in light of the legal principles embodied in the EPA and Title VIII, the Court finds that Ms. Townsend's claims of discrimination were not objectively reasonable. Ms. Townsend's claims for wage discrimination and failure to promote are based entirely on her own belief that her job is comparable to that of Mr. Reyes and that she therefore should have been promoted to Reporter 4. Yet, Ms. Townsend concedes that she knew little about Mr. Reyes' background and day-to-day activities before she brought this lawsuit. Mr. Reyes works for a different publication, travels internationally for his stories, and has specialized knowledge and contacts in his field of Latin American journalism. Ms. Townsend, although a commendable local reporter, has not demonstrated any such specialized skills or additional efforts in her job. Furthermore, Ms. Townsend offers no evidence outside of her own assertions to counter her supervisors' unanimous opinion that she is not ready to be promoted to Reporter 4. Her supervisors gave specific reasons for denying her promotion and even offered to assist her on improving on her weaknesses. In sum, there is nothing in the record that ties her supervisors' decision to sex discrimination.[4]

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[4] Mr. Ibarqüen's alleged statement — "I will not tolerate you accusing us of discriminating against you. You first brought a sexual harassment complaint. Now discrimination. What's next?" — is not probative of Ms. Townsend's underlying wage discrimination and her failure to promote claims. Rather, this statement is evidence showing there was a causal link between Ms. Townsend's complaints of discrimination and her termination. Accordingly, the Court will not consider the

(continued...)

No rational jury could find Ms. Townsend's belief that her opposition to Mr. Reyes' higher position and pay constituted opposition to an unlawful employment practice to be objectively reasonable. Consequently, Knight Ridder did not retaliate against her as a matter of law under Title VII, the EPA, or the FCA.

Accordingly, the defendants' motion for summary judgment on Counts II, IV & VI is GRANTED and Ms. Townsend's cross-motion for summary judgment on these counts is DENIED.

VII. Conclusion

Having considered the facts of the case in the light most favorable to Ms. Townsend, the Court finds that Ms. Townsend has failed to show that there is an issue of material fact regarding her claims of sex discrimination, and that the defendants are entitled to summary judgment as a matter of law. Accordingly, the defendants' motion for summary judgment [D.E. 70] is GRANTED. All other pending motions are DENIED AS MOOT, and any scheduled hearings or conference are CANCELED. This case is CLOSED.

(...continued)
statement for purposes of determining whether Ms. Townsend's beliefs were objectively reasonable.

As noted above, because Ms. Townsend's complaints of discrimination were not objectively reasonable, and therefore not protected opposition under Title VII, she fails the first prong of the retaliation prima facie test. Thus, the Court need not consider Mr. Ibarqüen's statement in determining whether Ms. Townsend has met the other prongs of that test.

DONE and ORDERED in chambers in Miami, Florida this 31st day of January 2000.